tically the same. The performance of the contract was delayed many years by litigation as to title, begun just before the contract was made. The land increased enormously in value in the meantime, and also became heavily encumbered with taxes. It appeared as a fact in each case that the parties expected, when the contract was made, that the litigation would last only a few weeks. In the New York case it was held that the fact that litigation would last so long was not contemplated by the parties when they contracted, and for that reason, together with the changes in values, etc., specific performance was refused. In the New Jersey case, where the decision was the other way, Vice-Chancellor PITNEY said, "But the parties acted deliberately upon the situation as it then appeared, and a mere mistake in judgment will not avail them. In fact no one then supposed that clearing an adverse possession would prove to be a serious matter or occupy any great length of time. All acted upon the contrary supposition. It is now too late for the defendants to set up their mistake of judgment in a matter of that kind as a defense to a contract fair in all its parts. The contract must be judged by the circumstances as they then existed." However, even conceding for the sake of argument that the holding of the New York case was correct (see the later case of *Gotthelf* v. *Stranahan,* 138 N. Y. 345, 352) and that the time of performance was an essential element, still it does not support the principal case. In the latter, any contemplation of time in the contract was, under the circumstances, necessarily absent from the minds of the parties. The element of time entered the case only as a result of a mistake for which neither complainant nor defendants were responsible.

One further matter should, perhaps, be noticed. Courts of equity do not always refuse specific performance where the circumstances have changed even if the change is not such as the parties must have reasonably contemplated. "It is the advantage of the court of equity, as observed by Lord REDESDALE in *Davis* v. *Hone,* 2 Sch. & Lef. 348, that it can modify the demands of the parties according to justice; and where as in that case it would be inequitable from a change in circumstances to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract or, what is the same thing, will take a decree upon a condition of doing or relinquishing certain things to the other party. The same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events or even from collateral circumstances, work hardship or injustice to either of the parties." *Willard* v. *Tayloe,* 8 Wall. 557; *King* v. *Raab,* 123 Ia. 632; *Gotthelf* v. *Stranahan,* 138 N. Y. 345, 352. This is especially true in option contracts of all sorts. For other instances where specific performance is thus conditionally allowed, see case note 10 L. R. A. (N. S.) 117 and 10 L. R. A. (N. S.) 125. The Virginia court's decision certainly seems very narrow when its spirit is compared with that of these cases. B. W. S.

IS VASECTOMY A CRUEL PUNISHMENT?—In *State* v. *Feilen* (Wash. 1912), 126 Pac. 75, the Supreme Court of Washington has upheld the validity of a

statute imposing, as a punishment for crime, an operation for the prevention of procreation. The statute provides that whenever any person shall be convicted of statutory rape, or adjudged an habitual criminal, "the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation." After conviction for statutory rape upon a female child under 10 years of age, defendant was sentenced to life imprisonment and the judge further directed that the operation known as vasectomy be performed upon him. The court held unanimously that this was not a cruel punishment within the meaning of the constitutional provision.

The constitutional provision against cruel and unusual punishments goes back to Magna Carta. It was incorporated in the Federal Constitution (Amendments, Art. 8), and has a place in one form or another in the constitutions of all the states except Illinois, Connecticut, and Vermont. As the provision in the Federal Constitution does not apply to state but to national legislation, the decision of the Washington Supreme Court in the principal case is final. *Pervear* v. *The Commonwealth,* 5 Wall. 475, 18 L. Ed. 608; *Barron* v. *Baltimore,* 7 Pet. 243, 8 L. Ed. 672; *U. S.* v. *Cruikshank,* 92 U. S. 542; *Hurtado* v. *Calif.,* 110 U. S. 516; *Barbier* v. *Connolly,* 113 U. S. 27; *In re Kemmler,* 136 U. S. 436. In England the clause has been regarded as applying only to those barbarous punishments of the early common law such as drawing and quartering. 4 BLACKSTONE 92, 327, 377. On practically this ground early American cases sustained whipping as a punishment. *Com.* v. *Wyatt,* 6 Rand. 694; *Foot* v. *State,* 59 Md. 264; *Aldridge* v. *Com.,* 2 Va. 447. A new method of inflicting the death penalty is not unconstitutional: such as shooting (*Wilkerson* v. *Utah,* 99 U. S. 130, 25 L. Ed. 345), or electrocution (*People ex rel. Kemmler* v. *Durston,* 119 N. Y. 569; *In re Kemmler,* supra; *In re Storti,* 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 520; *State* v. *Tomassi,* 75 N. J. L. 739, 69 Atl. 214). Many cases say distinctly that the provision was never intended to hamper the legislature. *Whitten* v. *State,* 47 Ga. 297; *Mo. P. R. R. Co.* v. *Humes,* 115 U. S. 512; *Garcia* v. *Terr.,* 1 N. M. 415; *People* v. *Smith,* 94 Mich. 644. In fact, one case goes so far as to suggest that the provision is now practically obsolete. *Hobbs* v. *State,* 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

On the other hand, there is a dictum to the effect that "imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." *McDonald* v. *Com.,* 173 Mass. 322. And imprisonment for 5 years and then to give security to keep the peace for five years for wife-beating was held to be cruel and unusual. *State* v. *Driver,* 78 N. C. 423.

But however this clause may formerly have appeared to some courts there can be no doubt about its being very much alive since the decision in *Weems* v. *U. S.,* 217 U. S. 349. There the court held, four to two, that the Eighth Amendment does apply as a constitutional prohibition on the legislative power, and that the courts may declare unconstitutional a law imposing a punishment which is clearly out of proportion to the crime. In this case WHITE and HOLMES, JJ., filed a strong dissenting opinion which pointed

out that the decision gave an entirely new interpretation to the Eighth Amendment.

In the principal case the court says that the discretion of the legislature will not be disturbed by the courts except in extreme cases, and then, as has been said so many times about cases alleged to come under the cruel punishment prohibition, it states that this case does not come under that clause. The court in reaching this decision relies on the fact that the death penalty has not been considered too severe for this crime, whereas vasectomy is an operation which may be painlessly performed in a few minutes under a local anæsthetic. The operation itself consists in ligating and resecting a small portion of the vas deferens. Sterilization is thus brought about. There is no doubt that the case is fully in accord with the best principles of modern preventive criminology and was decided correctly even under the doctrine laid down in *Weems* v. *U. S., supra.* The court has been criticised for ignoring the fact that life imprisonment involved such a segregation as would prevent procreation, thereby accomplishing the purpose of the statute. 12 LAW NOTES, 122. But it is submitted that as the practical possibilities of pardon even for revolting crimes are well known, the court was justified in effectually carrying out the real purpose of the statute and placing the matter beyond recall.

There is, however, one matter that might well have been given some attention in this, the first case on sterilization of criminals to go to a court of last resort. The decision goes on the assumption that some possible pain incident to the operation itself is the only punishment to be discussed and appears to ignore entirely the fact that the loss of the power to have children might be a much greater punishment. Castration is often mentioned in the older cases along with quartering, etc., as an example of a cruel and unusual punishment. Were the pain, the loss of sexual enjoyment and the effect on the man's physique, rather than the loss of procreative power, the cruel features of it? The principal case would seem to imply an affirmative answer. It is submitted that this is too important a question to be settled by implication alone. For further discussion of vasectomy and sterilization in general, see 23 Medico-Legal Journal 684, 27 id. 134, 29 id. 92; Pearson's Mag., Nov., 1909. G. S. B.